Rudy bin Jupri v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–269 OF 2011
SYED AHMAD HELMY, MAH WENG KWAI JJCA AND DAVID WONG J
10 DECEMBER 2012

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Criminal Law — Murder — Penal Code — s 302 — Appeal against conviction and sentence — Appellant charged with murdering two sisters by stabbing — Appellant giving information to police leading to recovery of knife used in murders — Appellant's DNA found in vagina and nail clippings of older victim — DNA of younger victim found on knife — Whether failure of trial judge to state that he had conducted maximum evaluation of prosecution's evidence at close of prosecution's case was fatal — Whether there was break in chain of exhibits — Whether prima facie case established — Ingredients to be proved by prosecution and facts properly evaluated by trial judge — Whether conviction safe — Criminal Procedure Code s 180(1)

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Criminal Procedure — Charge — Wrong charge — Appellant accused of sexual intercourse with body of dead victim — Appellant charged with rape under s 376(4) of the Penal Code — Whether appellant only guilty of necrophilia and not rape

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Evidence — Burden of proof — Prima facie case — Whether failure of trial judge to state that he had conducted maximum evaluation of prosecution's evidence at close of prosecution's case was fatal

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The appellant was charged with two counts of murder punishable under s 302 of the Penal Code ('Code') and with a third offence under s 376(4) of the Code of having committed rape and causing death. The victims were sisters aged 17 years and 6 years respectively. The appellant was said to have stabbed the victims and to have raped the older victim. According to PW10 (the elder sister of the deceased), the appellant was known to the family as he was a friend of the older victim and had visited the house previously. According to PW10, the older victim had just days before her death informed PW10 that she intended to break off her relationship with the appellant. The appellant worked as a security guard at a school. On the day the murders took place, the appellant was seen leaving his guard post at about 10.30am and returning to the school at about 1.30pm. Upon his arrest, the appellant gave information to the police which had led to the recovery of the knife used in the murders. The DNA of the

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A appellant was found in the vagina and on the nail clippings of the older victim. DNA of the second deceased was found on the knife. Upon the close of the prosecution's case the learned trial judge held that the prosecution had proved a prima facie case against the appellant on all the three charges and ordered him to enter his defence. At the close of the defence case, the learned trial judge B found the appellant guilty and convicted him on all the three charges. The appellant appealed against the convictions and sentences on the grounds that: (i) that the trial judge did not state in his ruling before the defence was called that he had evaluated the prosecution's evidence to maximum evaluation test at the close of the prosecution's case; and (ii) that the trial judge did not C adequately consider that there was a break in the chain of exhibits taken from the accused, at the crime scene and stored in the investigation officer's steel cupboard.

Held, dismissing the appeal on the first two charges and allowing the appeal on D the third charge:

(1) It was the prosecution's case that the appellant had sexual intercourse with the first deceased after she had died. In that case the appellant may only be guilty of necrophilia but not of an offence under s 376(4) of the Code. The appellant was thus acquitted and discharged on the third E charge (see para 20).

(2) It was clear that the trial judge was satisfied that the prosecution had made out a prima facie case before ordering the appellant to enter his defence. The learned trial judge did not spell out or mention the words F 'maximum evaluation' specifically in the notes of proceedings or in his grounds of judgment. But what was more pertinent and important was for the court to determine, in a holistic manner from the grounds of judgment and the notes of proceedings, whether the learned trial judge had in fact and in law considered or appreciated or 'evaluated' the G prosecution's case satisfactorily to come within the scope of s 180(1) of the Criminal Procedure Code (see paras 24–25).

(3) The learned trial judge did consider the ingredients to be proved by the prosecution to sustain a charge of murder; did consider all the facts adduced in the prosecution's case and made findings thereon and did H consider the information given by the appellant (under s 27 of the Evidence Act 1950) that led to the recovery of the knife before going on to consider the defence of the appellant (see para 26).

(4) There were discrepancies in the evidence of PW13 as to when and where I the appellant's blood sample was taken. But when he was recalled for further examination-in-chief and cross-examination he was able to explain himself. The mistake appeared to be a genuine and innocuous mistake. Importantly, there was no discrepancy or contradiction and thus no doubt that the blood sample of the appellant was taken personally by

PW14 who was able to identify the appellant in court. There was also no evidence to suggest that the blood sample of the appellant had been mixed up with that of another person (see paras 28–30).

(5) There was no tampering of the exhibits before they were produced and tendered as evidence in court. The exhibit register book was produced in court. The entries in the register book accounted for the movement of the exhibits sufficiently and did not show a breach in the chain of custody of the exhibits to cast a doubt on the prosecution's case (see para 31).

[Bahasa Malaysia summary

Perayu telah dipertuduh dengan dua tuduhan membunuh yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun') dan dengan kesalahan ketiga di bawah s 376(4) Kanun kerana merogol dan menyebabkan kematian. Mangsa masing-masing merupakan adik-beradik berumur 17 tahun dan enum tahun. Perayu dikatakan telah menikam mangsa-mangsa dan merogol mangsa yang lebih tua. Menurut PW10 (kakak si mati yang lebih tua), perayu dikenali oleh keluarga memandangkan dia merupakan kawan kepada mangsa yang lebih tua dan pernah datang ke rumah sebelumnya. Menurut PW10, mangsa yang lebih tua telah memberitahu PW10 beberapa hari sebelum kematiannya bahawa dia berniat untuk memutuskan hubungan dengan perayu. Perayu bekerja sebagai pengawal keselamatan di sebuah sekolah. Pada hari pembunuhan tersebut berlaku, perayu dilihat meninggalkan pos pengawal pada sekitar 10.30 pagi dan kembali ke sekolah pada sekitar 1.30 petang. Selepas penangkapannya, perayu memberi maklumat kepada polis yang membawa kepada penemuan pisau yang digunakan dalam pembunuhan. DNA perayu ditemui dalam vagina dan pada keratan kuku mangsa yang lebih tua. DNA si mati kedua ditemui pada pisau tersebut. Pada penutupan kes pendakwaan, hakim yang bijaksana memutuskan bahawa pendakwa raya telah membuktikan kes prima facie terhadap perayu ke atas ketiga-tiga pertuduhan dan mengarahkan perayu untuk memasukkan pembelaannya. Pada penutup kes pendakwaan, hakim yang bijaksana mendapati tertuduh bersalah dan menyabitkannya ke atas ketiga-tiga pertuduhan. Perayu merayu terhadap sabitan-sabitan dan hukuman-hukuman atas alasan-alasan bahawa: (i) hakim bicara tidak menyatakan dalam penghakimannya sebelum pembelaan dipanggil bahawa beliau telah menilai keterangan pendakwa raya hingga ujian penilaian maksimum pada penutupan kes pendakwaan; dan (ii) hakim bicara tidak mempertimbangkan secukupnya bahawa terdapat pecahan dalam rantaian ekshibit yang diambil daripada tertuduh, di tempat kejadian dan disimpan dalam almari besi pegawai penyiasat.

Diputuskan, menolak rayuan ke atas dua pertuduhan pertama dan membenarkan rayuan ke atas pertuduhan ketiga:

(1) Adalah merupakan kes pendakwa raya bahawa perayu telah melakukan hubungan seks dengan si mati pertama selepas dia meninggal dunia.

A Oleh itu, perayu hanya bersalah kerana necrophilia tetapi bukannya kesalahan di bawah s 376(4) Kanun. Perayu oleh itu dilepaskan dan dibebaskan daripada pertuduhan ketiga (lihat perenggan 20).

(2) Adalah jelas bahawa hakim bicara telah berpuas hati bahawa pendakwa
B raya telah membuktikan kes prima facie sebelum mengarahkan perayu untuk memasukkan pembelaannya. Hakim bicara yang bijaksana tidak menyatakan atau menyebut perkataan 'penilaian maksimum' secara spesifik dalam nota-nota prosiding atau dalam alasan penghakiman beliau. Tetapi apa yang lebih utama dan penting untuk ditentukan oleh
C mahkamah daripada alasan penghakiman dan nota-nota prosiding secara keseluruhannya, sama ada hakim bicara yang bijaksana sebenarnya telah dan di sisi undang-undang, mempertimbangkan atau menghargai atau 'menilai' kes pendakwaan secara secukupnya untuk berada di dalam skop s 180(1) Kanun Acara Jenayah (lihat perenggan 24–25).

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(3) Hakim yang bijaksana telah mempertimbangkan intipati-intipati yang perlu dibuktikan oleh pendakwa raya untuk mengekalkan pertuduhan pembunuhan; mempertimbangkan semua fakta yang dikemukakan dalam kes pendakwa raya dan membuat dapatan-dapatan
E berdasarkannya dan mempertimbangkan maklumat yang diberikan perayu (di bawah s 27 Akta Keterangan 1950) yang membawa kepada penemuan pisau sebelum mempertimbangkan pembelaan perayu (lihat perenggan 26).

F (4) Terdapat percanggahan dalam keterangan PW13 mengenai bila dan di mana sampel darah perayu diambil. Tetapi apabila dia dipanggil untuk pemeriksaan utama lanjutan dan pemeriksaan balas, dia dapat menjelaskannya. Kesilapan tersebut tampak tulen dan kecil. Yang lebih penting, tiada perbezaan atau percanggahan dan oleh itu tiada keraguan
G bahawa sampel darah perayu telah diambil sendiri oleh PW14 yang boleh mengenalpasti perayu di mahkamah. Tiada keterangan yang mencadangkan bahawa sampel darah perayu telah bercampur dengan orang lain (lihat perenggan 28–30).

(5) Tidak terdapat sebarang gangguan ekshibit-ekshibit sebelum
H ekshibit-ekshibit tersebut dihasilkan dan dikemukakan sebagai keterangan di mahkamah. Buku daftar ekshibit telah dikemukakan di mahkamah. Kemasukan-kemasukan dalam buku daftar secara memadai menunjukkan pergerakan ekshibit-ekshibit dan tidak menunjukkan pelanggaran dalam rantaian jagaan ekshibit-ekshibit untuk
I menimbulkan keraguan ke atas kes pendakwa raya (lihat perenggan 31).]

Notes

For cases on Penal Code, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1531–1534.

For cases on prime facie case, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 676–678.
For cases on wrong charge, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1560–1568.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Looi Kow Chai & Anor v PP [2003] 3 MLJ 65, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(1)
Evidence Act 1950 s 27
Penal Code ss 302, 376(4)

Appeal from: Criminal Trial Nos S45–03 of 2010, S45–05 of 2010 and S45–06 of 2010 (High Court, Sandakan)

PJ Perira (PJ Perira & Co) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] The appellant, Rudy bin Jupri was charged with two counts of murder punishable under s 302 of the Penal Code and with an offence under s 376(4) of the Penal Code of having committed rape and causing death.

[2] The first charge was that the appellant caused the death of one Siti Nor Adibah bt Harianto ('the first deceased') on 15 April 2009 between 10am and 5pm at an unnumbered house at Kg Lung Manis, Beluran, Sabah.

[3] The second charge was that the appellant caused the death of one Nor Rafidah bt Harianto ('the second deceased') at the same time, date and place.

[4] The third charge against the appellant was that while he was committing rape against the first deceased he had caused her death.

[5] The first and second deceased were sisters aged 17 years and 6 years respectively.

[6] On 15 April 2009, the parents of the deceased left their house at about

10am to go to work at their plantation leaving their two daughters at home. When the parents returned from work at about 5pm, they found their two daughters dead. Both were found lying on the floor of the living room with their bodies covered in blood.

[7] The post mortem examination on 20 April 2009 revealed that the first deceased sustained 27 injuries consisting of stab wounds, incised wounds, abrasions and bruises while the second deceased sustained 18 injuries consisting of stab wounds and incised wounds. The cause of death of both the deceased was stated as 'hypovolaemic shock due to or as a consequence of the stab wounds on the neck'. This was explained by Dr Jessie Hiu ('PW3'), the forensic pathologist to mean that both the deceased suffered from reduced blood pressure and blood supply to the vital organs due to excessive loss of blood thus resulting in death. PW3 was of the opinion that a sharp weapon was used to cause the stab and incised wounds.

[8] According to Haryati bt Harianto ('PW10') the elder sister of the deceased, the appellant was known to the family as he was a friend of the first deceased and had visited the house previously. In her evidence, PW10 informed the court that the first deceased had just days before her death informed PW10 that she intended to break off her relationship with the appellant.

[9] The appellant, being the (only) suspect, was arrested by the police on the same day at about 9.45pm.

[10] The appellant worked as a security guard at Sekolah Lung Manis, Sandakan and according to Opong bin Simantik ('PW7') the appellant was seen leaving his guard post at about 10.30am on the same day and returning to the school at about 1.30pm.

[11] Upon his arrest and after interrogation by the police, the appellant informed DSP Sivanathan s/o Vilauthan ('PW9') that he '(*saya*) telah bakar pisau itu di belakang rumah pukul tiga petang tadi'. PW9 then lodged a police report (exh P9) to reduce into writing what the appellant had informed him. After the report was lodged, the appellant led PW9 and other officers to a place behind his house in Kg Lung Manis. There the appellant pointed to a pile of burnt rubbish and after a search of the pile of rubbish, the knife was recovered. The knife was produced in court as exh P12.

[12] On 8 May 2009, the appellant was escorted to the Duchess of Kent Hospital, Sandakan by L/Kpl Ruslan bin Kaldin ('PW13') for a sample of his blood to be taken. There, at the Hospital a sample of blood was taken from the

appellant by Dr R Mahenderan ('PW14') who was the medical officer on duty at the Emergency Department of the Hospital.

[13] Swabs of the vagina of the first deceased were taken by the pathologist ('PW3') and marked as exhs P20(b) and P20(c). Nail clippings of the first deceased was also taken and marked as exhs P21(a) and P21(b). The exhibits were handed over by L/Kpl Jimmy Carter anak Nawin ('PW2') to the Chemistry Department on 20 May 2009. On analysis by Puan Zaliha bt Suadi ('PW11') the chemist attached to Jabatan Kimia, Kuching, it was stated in her report dated 27 July 2009 (exh P16) that the DNA of the appellant was found in the vagina and on the nail clippings of the first deceased.

PW11's chemist report also stated that the DNA of the second deceased was found on the knife. The identification of the DNA of the second deceased was made from the blood stains found on the knife which matched with the DNA on the nail clippings of the second deceased.

[14] Upon the close of the prosecution's case the learned trial judge held that the prosecution had proved a prima facie case against the appellant on all the three charges and ordered him to enter into his defence.

[15] The defence of the appellant, given an oath, was essentially one of an alibi, that is, that he was not present at the crime scene and could not possibly have committed the offences.

[16] At the close of the defence case, the learned trial judge found that the appellant had failed to raise or create any doubt in the prosecution's case and accordingly found him guilty and convicted him on all the three charges. The appellant was sentenced to death on the first and second charges and to imprisonment of 25 years with effect from the date of his arrest and ten strokes of whipping on the third charge.

[17] The appellant appealed to the Court of Appeal against the convictions and sentences imposed on him.

GROUNDS OF APPEAL

[18] In his submissions, counsel for the appellant relied on two grounds only, namely:

(a) that the learned trial Judge had erred in law when he did not state in his ruling before the defence was called that he had evaluated the Prosecution's evidence to maximum evaluation test at the close of the Prosecution's case and

A (b) that the learned trial Judge did not adequately consider that there was a break in the chain of exhibits taken from the accused, at the crime scene and stored in the investigation officers steel cupboard. There were severe discrepancies in the storage of exhibits. The learned trial Judge did not adequately consider that there were severe and material discrepancies in the date the blood of the accused was taken, by whom, and where it was taken.

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It will be noted at this juncture that the s 27 of the Evidence Act evidence, given by the appellant to PW9 which led to the recovery of the knife is not a ground of appeal relied on by the appellant.

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DECISION OF THE COURT

D **[19]** Upon reading the record of appeal, the grounds of judgment and the written submissions of learned deputy public prosecutor and counsel for the appellant and upon hearing the oral submissions of the parties aforesaid, the court held that there was no merit in both the grounds of appeal against the first and second convictions and accordingly the convictions and sentences were E upheld.

[20] However, on the third charge the court allowed the appeal and set aside the conviction and sentence as it was the prosecution's case that the appellant had sexual intercourse with the first deceased *after* she had died. In that case the F appellant may only be guilty of necrophilia but not of an offence under s 376(4) of the Penal Code. The appellant was thus acquitted and discharged on the third charge.

REASONS FOR THE DECISION

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[21] The court held that there was no appealable error on the part of the learned trial judge's findings although there were some discrepancies in the evidence of L/Kpl Ruslan bin Kaldin ('P13') as to the place and date on which H the blood sample was taken from the appellant. The court accepted the evidence of Dr R Mahenderan ('PW14') who testified that he was the one who had personally extracted the blood from the appellant on 8 May 2009 is being reliable evidence. The court also accepted the evidence that the blood sample analysed by Puan Zaliha bt Suadi ('PW11') the chemist, was indeed and in fact the blood sample taken from the appellant. I

The court further upheld the finding that the knife (P12) was the weapon used to cause the injuries which led to the death of both the deceased.

[22] The DNA evidence found on the swabs taken from the vagina of the

first deceased and on her nail clippings was confirmed to be that of the appellant. The DNA evidence found on the knife showed there the blood stains belonged to the second deceased.

[23] Counsel for the appellant submitted that the learned trial judge did not subject the prosecution's evidence to a maximum evaluation at the close of the prosecution's case and before calling for the defence and that this omission was a misdirection and fatal in law.

[24] At p 204 of the record of appeal, the learned trial judge had said:

> This is my ruling at the end of the prosecution's case. Having read the NOP, perused the various exhibits and read the written submissions of learned counsels for the accused and the prosecution, I find that the prosecution has proved a prima facie case against the accused in respect of all the three charges preferred against him. I therefore order him to enter his defence in respect of the said three charges preferred against him.

and at p 311 of the record of appeal, the learned trial judge at para 7 of his grounds of judgment held:

> After the close of the prosecution's case, the court ruled that the prosecution had made out a prima facie case against the accused and ordered the accused to enter his defence as provided under s 180(1) of the Criminal Procedure Code

From the two quoted passages, it is clear that the learned trial judge was satisfied that the prosecution had made out a prima facie case before ordering the appellant to enter into his defence.

At para 7 of the grounds of judgment, the learned trial judge referred specifically to s 180(1) of the Criminal Procedure Code which provides that a prima facie case has been made out against an accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[25] No doubt, the learned trial judge did not spell out or mention the words 'maximum evaluation' specifically in the notes of proceedings or in his grounds of judgment. Granted the learned trial judge did not wave a magic wand and utter the words 'maximum evaluation' at the end of the prosecution's case to show that a prima facie case had been established. But what is more pertinent and important is for the court to determine, in a holistic manner from the grounds of judgment and the notes of proceedings, whether the learned trial judge had in fact and in law considered or appreciated or 'evaluated' the prosecution's case satisfactorily to come within the scope of s 180(1) of the Criminal Procedure Code.

[26] In the present case a consideration of the grounds of judgment by the

court showed that the learned trial judge did consider the ingredients to be proved by the prosecution to sustain a charge of murder; did consider all the facts adduced in the prosecution's case and made findings thereon and did consider the information given by the appellant (under s 27 of the Evidence Act 1950) that led to the recovery of the knife (P12) before going on to consider the defence of the appellant from para 35 (at p 320 record of appeal) onwards. Importantly, the learned trial judge had accepted the evidence of the chemist ('PW11') who confirmed that the DNA of the appellant was found in the vagina and on the nail clippings of the first deceased. And that the blood stains on the knife matched the DNA of the second deceased. The admission of the s 27 of the Evidence Act evidence that led to the recovery of the knife and of the fact of the recovery of the knife itself were not seriously challenged by the appellant at trial.

[27] In his written submissions, counsel for the appellant cited the cases of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 1 MLJ 65 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 to support his proposition that the learned trial judge must undertake a positive evaluation of the credibility and reliability of all the evidence adduced to arrive at a finding of whether a prima facie case had been made out. This court is in full agreement with the proposition of law propounded in the aforesaid cases. But with respect, the court cannot go further and agree with counsel for the appellant that just because the learned trial judge had not specifically mentioned the words 'maximum evaluation', after having alluded to the requirements of a prima facie case under s 180(1) of the Criminal Procedure Code, that that amounts to a misdirection by the learned trial judge.

[28] On the second ground, counsel for the appellant submitted that there were 'severe and material discrepancies' in the collection, storage and production of the exhibits in court and that there was a breach in the chain of custody of exhibits.

Admittedly, there were discrepancies in the evidence of L/Kpl Ruslan bin Kaldin (PW13) as to when and where the sample of blood was taken from the appellant. But when he was recalled for further examination-in-chief and cross-examination he was able to explain that the blood sample was not taken on 17 April 2009 at the Beluran Hospital but on 8 May 2009 at the Duchess of Kent Hospital in Sandakan. The mistake appears to be a genuine and innocuous mistake. What PW13 explained was that he had initially proceeded with the appellant to the Beluran Hospital on 17 April 2009 but as there was no doctor available to take the sample of blood from the appellant, he had returned to Beluran Police Station. And that on 8 May 2009 he escorted the appellant to the Duchess of Kent Hospital, Sandakan where they met Dr R Mahenderan ('PW14'). PW13 in his re-examination confirmed that he had

not been coached by either the investigating officer C/Insp Marzuki bin Ahmad Mahadi ('PW16') or by the learned DPP in order to bolster the prosecution's case to secure a conviction (see record of appeal p 160).

[29] Importantly, there is no discrepancy or contradiction and thus no doubt, that the blood sample (exh P17) of the appellant was taken personally by PW14. PW14 in his evidence specifically confirmed this and was able to identify the appellant in court. PW14 had also completed the Form Kimia 15 dated 8 May 2009 (P29) and Form HDOK dated 8 May 2009 (P30) and returned them to PW13 to complete the exercise. The fact that the two forms were dated 8 May 2009 and not 17 April 2009 by PW4 clearly proves beyond doubt that the blood sample was in fact taken from the appellant on 8 May 2009.

[30] There is no doubt also that the chemist ('PW11') had analysed the DNA of the appellant from the blood sample of the appellant and none other. Throughout this case, there can be no suggestion of the blood sample of a third person being involved as there was none. C/Insp Marzuki ('PW16'), the investigating officer had explained as to how all the exhibits had been stored. There is no evidence to suggest that the blood sample of the appellant had been mixed up with that of another person.

[31] During submissions after the trial, the former counsel for the appellant suggested that the DNA evidence of the appellant had been *planted* by the police. This would have meant that the police had placed traces of the appellant's DNA, presumably from the appellant's blood sample, in the vagina and on the nail clippings of the first deceased. Considering that the vaginal swabs and the nail clippings were taken from the first deceased on 20 April 2009 during the post mortem and that the blood sample was taken on 8 May 2009, the suggestion seems preposterous and absurd to say the least as the blood sample of the appellant was not even available as at 20 April 2009.

Further, counsel contended that the police did so as the motive was to secure a conviction against the appellant. This was a very serious allegation made by counsel in a very serious case. Apart from conjecture and hypothesis, counsel for the appellant had no evidence to back up his allegation. On the contrary, it is ridiculous for the police to want to plant the evidence and to frame the appellant for murder when there was no vested interest involved at all to do so. The police officers were merely carrying out their duties. There may have been minor mistakes and omissions made in the course of investigations but there is absolutely no evidence to suggest that the police officers had planted the evidence to secure a conviction against the appellant.

The court was more than satisfied that there was no tampering of the exhibits before they were produced and tendered as evidence in court. The exhibit register book (exh P28) was produced in court. The entries in the register book

account for the movement of the exhibits sufficiently and do not show a breach in the chain of custody of the exhibits to cast a doubt on the prosecution's case.

In further cross-examination of L/Kpl Jimmy Carter ak Nawin ('PW2') he seemed to agree with the contention put to him by counsel for the appellant that the exhibits had been tampered with. However in re-examination, PW2 explained that he had agreed with the suggestion of 'tampering' as he found the exhibits 'open' in court but did not know why they were opened. The explanation of PW2 who is a mere lance corporal, can be accepted by the court as being reasonable as to him the 'opening' of the exhibits, which were sealed when handled by him, amounted to 'tampering'. There was no suggestion that the exhibits were 'tampered' with for an unlawful purpose.

CONCLUSION

[32] On the totality of the evidence the court was of the unanimous view that the convictions for the two offences of murder are safe and accordingly the convictions and sentences are upheld.

Appeal on the first two charges dismissed and appeal on the third charge allowed.

Reported by Kanesh Sundrum